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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JULIO ARMANDO BELTRAN, Defendant and Appellant.	2d Crim. No. B204402 (Super. Ct. No. 2004049326) (Ventura County)

Julio Armando Beltran appeals from the judgment following his conviction, after a jury trial, of attempted murder. (Pen. Code, §§ 664, 187, subd. (a).)[1] The jury also found that he personally and intentionally discharged a firearm that caused great bodily injury. (§ 12022.53, subd. (d).) The court sentenced him to 32 years to life in state prison. Appellant raises instructional errors. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Antonio Barajas, his brother, Ignacio Barajas, their cousin, Mario Venegas, and Mario's friend went to Roger's Cafe in Oxnard to watch a boxing match on July 31, 2004, at approximately 6:00 p.m. They ate, drank several beers, and saw Antonio's friend, Andres Garcia, and his companions.

[1] All statutory references are to the Penal Code.

Antonio and his companions left Roger's Cafe and went to the Hideaway Bar in Oxnard at approximately 11:00 p.m. Andres and his wife, Cecilia, were also at the Hideaway. Cecilia introduced Antonio to Antonia Carrillo (Toni). While Antonio spoke with Toni, appellant started tugging on Toni's jacket. Appellant was "wasted" or drunk. Toni told him to "back off," but he persisted. She told appellant that if he did not "knock it off, [she would] knock [him] out." Antonio and Andres also told appellant to leave Toni alone. Appellant swore and hit the bar with his hands for several minutes.

At about 2:00 a.m., Antonio left the Hideaway with his companions to meet Andres, Cecilia, and Toni at Super Antojitos, a restaurant in Oxnard. As they left, appellant approached Antonio and challenged him to a fight. Antonio said he could not fight because his shoulder blade was broken. Andres told appellant to stop. Appellant told Antonio that he would return and kill him. He looked at Toni as he rushed from the restaurant and made a similar threat to her.

Appellant, who was Andres' mechanic, rode to Super Antojitos with Andres, Cecilia, and Toni. When they arrived, appellant went to the rear section of the restaurant to play pool.

At around 3:30 a.m., Toni, Antonio, Andres and Cecilia were at a table in Super Antojitos when a friend of Andres' entered the restaurant. He appeared to look for someone, spoke briefly with Andres, turned toward the entrance where appellant stood, nodded at appellant, and left. Appellant then entered and stood by Andres. Because of the earlier conflict between appellant and Antonio, Toni told Cecilia that it was time to leave. Cecilia agreed.

Antonio also prepared to leave and gave Toni his telephone number as he said goodbye. Appellant approached Antonio and said, "I told you, cabron, I was going to come back and kill you." He pulled a gun from his waistband, pointed it at Antonio, and fired several rounds in quick succession from a distance of five or six feet. The shots struck Antonio twice in his lower left abdomen, twice in his left leg, and once in his left forearm. The shot in his left forearm also struck his upper right torso. Appellant ran to a nearby gas station and entered a waiting car that drove away immediately.

An ambulance took Antonio to the hospital where he had abdominal surgery and surgery to repair a severed artery. He remained in the hospital for five days. Multiple witnesses later identified appellant as the assailant.

DISCUSSION

Appellant contends that the trial court committed reversible error by failing to instruct the jury sua sponte that it should view evidence of his out-of-court statements with caution. The court's failure to give such a cautionary instruction constitutes harmless error in this case.

A court has a sua sponte duty to give a cautionary instruction when a defendant's admission is used to prove a part of the prosecution's case. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 498.) The court should have instructed the jury as follows with a cautionary instruction such as CALCRIM No. 358: "You have heard evidence that the defendant made an oral . . . statement[] before trial. You must decide whether the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements. [¶] Consider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded."

The court's failure to instruct the jury to view appellant's out-of-court statements with caution was not prejudicial. It gave the jury other instructions regarding its obligation to carefully review all the evidence (CALCRIM No. 301) and the factors that it could consider in assessing witnesses' credibility (CALCRIM No. 226). The jury heard other compelling evidence, apart from appellant's statements, that left no doubt regarding his intent to kill Antonio. Just before appellant shot Antonio, another man entered Super Antojitos, looked around, went to Antonio's table, and nodded at appellant. Appellant then entered the restaurant, approached Antonio, and shot him several times in rapid succession from a distance of five or six feet. Antonio suffered multiple injuries, including two abdominal wounds and a severed artery in his arm. It is not reasonably probable that the jury would have reached a result more favorable to appellant had it been

instructed to view evidence of his out-of-court statements with caution. (See *People v. Dickey* (2005) 35 Cal.4th 884, 905.)

Appellant also contends that the court erred by giving the jury an incomplete voluntary intoxication instruction and that the jury "could have been confused [about] which party had the burden of proof." We disagree. The trial court instructed the jury with CALCRIM No. 625 that it could consider voluntary intoxication in deciding whether appellant acted with an intent to kill but for no other purpose.[2] Appellant does not contend that CALCRIM No. 625 incorrectly states the law. Rather, he challenges the court's failure to also instruct the jury with CALCRIM No. 3426, which states that in connection with attempted murder, the prosecution has the burden of proving beyond a reasonable doubt that the defendant acted or failed to act with the intent to kill. The court has no sua sponte duty to amplify an instruction without a request by the defendant. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Thus, appellant has waived his claim of instructional error.

Moreover, any conceivable error in failing to instruct the jury with CALCRIM No. 3426 was harmless. In reviewing claims of instructional error, we assess instructions based upon a reading of the entire charge given by the trial court, and not from a consideration of parts of an instruction read in isolation. (See *People v. Lewis* (2001) 25 Cal.4th 610, 649.) Viewing CACRIM No. 625 in light of all the instructions given to the jury, we reject appellant's claim that the court could have confused the jury about which party had the burden of proof. It instructed the jury with CALCRIM No. 220 that the prosecution must prove a defendant guilty beyond a reasonable doubt and with CALCRIM No. 600 that the prosecution bears the burden of proving the defendant's

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[2] As given, CALCRIM No. 625 states in relevant part: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink or other substance, knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

intent to kill. It also instructed the jury with CALCRIM No. 200 that it must "[p]ay careful attention to all of [the] instructions and consider them together."

In addition, both the prosecutor and appellant's counsel argued that the prosecution bore the burden of proof as to appellant's specific intent to kill. While addressing the prosecution's burden to prove that intent, appellant's counsel noted that appellant "was plastered" and "totally wasted" and reminded the jury that it had "a voluntary intoxication instruction." Counsel later argued that the prosecution "[did not] want to acknowledge that [appellant] was totally wasted and that he was [voluntarily] intoxicated. . . . Because that [meant that] there [was] no intent to kill."[3]

The prosecutor responded to appellant's argument by reminding the jury that the shooting occurred at Super Antojitos, early in the morning, by which time witnesses did not describe appellant as drunk or "wasted." Toni testified that appellant was "wasted" at the Hideaway Bar, but that he had "kind of sobered up" by the time of the shooting at Super Antojitos. Andres recalled that there was nothing unusual about the way appellant was walking; his speech was not slurred; and he ran "normally," without "wavering from side to side," when he fled the shooting scene. Having examined the evidence, the jury instructions as a whole, and counsel's arguments, we conclude that it is unlikely that the voluntary intoxication instruction misled the jury to appellant's detriment.

We also reject the argument that the two claimed instructional errors were cumulatively prejudicial. Appellant shot Antonio several times in quick succession from

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[3] For the most part, the defense emphasis upon intoxication concerned the intoxication of the witnesses rather than appellant's intoxication. For example, based upon Antonio's description of his size and the amount of beer he drank between 6:30 and 11:30 p.m., a defense expert witness opined that his blood alcohol level would have been approximately 0.08 by the time of the shooting. While arguing to the jury, appellant's counsel described the witnesses as a "parade of drunk people" with the exception of "the cops." Counsel repeated this theme: "Among these people who had a lot to drink, and I'm being kind, [are] [Antonio] Barajas, Mario Venegas, Andres, [and] [Toni]. . . . [¶] . . . [¶] [S]omehow that's supposed to make their testimony more credible and make us feel better about convicting a man based on a bunch of drunk people."

close range and inflicted wounds that required abdominal surgery, surgery to repair a severed artery in his arm, and five days of hospitalization. No reasonable juror would find that appellant intended to wound rather than kill Antonio if the court had given more complete voluntary intoxication instructions and a cautionary instruction regarding his out-of-court statements.

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Allan L. Steele, Judge

Superior Court County of Ventura

Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie A. Miyoshi, Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.